Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLE

No. 78-611

In the

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN MIRABAL, SHARON MIRABAL and ALBERT KORETZKY,

Petitioners,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION, a corporation, and ED MURPHY BUICK-OPEL, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John Mirabal, Sharon Mirabal and Albert Koretzky, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 12, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit reported at 576 F. 2d 729 appears in the Appendix hereto. The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, appears in the Appendix hereto, page 13a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 12, 1978. A timely petition for rehearing in banc was denied on July 14, 1978, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether attorney's fees in a successful Truth in Lending action must be awarded for all time reasonably expended on the action.

2. Whether attorney's fees in a successful Truth in Lending action must be limited to the amount of recovery in the action.

3. Whether the award of $2,000.00 for 350 hours of work (or $5.71 an hour) constitutes a reasonable attorney's fee in a successful Truth in Lending action undertaken on a continegnt basis where opposing counsel received more than $30,000.00 in attorneys' fees.

STATUTES INVOLVED

United States Code, Title 15:

§1640. Civil Liability

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of —

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the cost of the action, together with a reasonable attorney's fee as determined by the court.

STATEMENT OF THE CASE

This is a Truth in Lending action brought by John Mirabal and Sharon Mirabal pursuant to 15 U.S.C. §1640(a). The action involved a retail installment contract for the purchase of an automobile with a total amount financed of $2,460.00. On December 30, 1971, the Mirabals filed this action charging numerous violations of the Truth in Lending Act, the Illinois Motor Vehicle Retail Installment Sales Act, Ill. Rev. Stat., ch. 121½, §561 *et seq.* (1969), and the Illinois Sales Finance Agency Act, Ill. Rev. Stat., ch. 121½, §401 *et seq.* (1969). The District Court found seven specific violations of the Truth in Lending Act and awarded $7,000.00 in damages, $1,000.00 per violation. Damages awarded under the state laws increased the amount awarded to $8,126.80 against General Motors Acceptance Corporation and Ed Murphy Buick-Opel, Inc. From this judgment, the defendants appealed and the Mirabals cross-appealed.

After judgment had been entered on October 1, 1974, Congress amended the Truth in Lending Act to bar multiple recoveries for multiple disclosure violations in a single disclosure statement. 15 U.S.C. §1640(g), as amended, Pub. L. No. 93-495, §408(e), 88 Stat. 1519, effective October 28, 1974.

On appeal the judgment was affirmed in part. *Mirabal* v. *General Motors Acceptance Corp.*, 537 F. 2d 871 (7th Cir. 1976). The Court of Appeals found one disclosure violation and did not consider the other six disclosure violations found by the District Court. The Court of Appeals agreed with the Mirabals that each debtor was entitled to a separate recovery of $1,000.00 The Court of Appeals then reduced the amount of the judgment

to $2,000.00 and remanded the case for a determination of costs and attorney's fees.

On remand, the Mirabals' attorney filed a verified petition for fees and costs stating that he spent 350 hours on the case, 120 at the trial level and 230 on the appeal. The defendants, respondents herein, filed no answer to the petition and did not dispute the number of hours expended nor that these hours were necessary. It was also admitted that General Motors Acceptance Corporation had paid its attorneys $30,585.00 as a fee for handling the case.

Despite the undisputed facts, the District Court only awarded $2,000.00 in attorney's fees and $690.10 in costs.

On the second appeal, the Court of Appeals, in affirming, took the view that attorney's fees must be proportionate to the amount of damages recovered by the client. The Court of Appeals also took the view that the fee of $30,585.00 which General Motors Acceptance Corporation paid its attorneys was irrelevant to any factors to be considered in awarding fees to the Mirabals and their attorney. A dissenting opinion was filed which pointed out that a (1) hearing was never held on the question of fees; (2) the number of hours spent by the Mirabals' attorney was undisputed; (3) the Mirabals' attorney had a duty to protect the judgment he obtained for his clients; (4) the fee paid by General Motors Acceptance Corporation was relevant to the question of the fee customarily charged for similar legal services; and (5) the majority's decision would discourage enforcement of the national policy to provide consumers with accurate and meaningful disclosure of credit.

REASONS FOR GRANTING THE WRIT

LIMITING AWARDS OF ATTORNEY'S FEES TO THE AMOUNT OF RECOVERY OBTAINED IS CONTRARY TO THE POLICY OF THE TRUTH IN LENDING ACT.

Congress intended that the Truth in Lending Act be enforced through private actions and provided for an award of a reasonable attorney's fee even in cases involving a $100.00 minimum penalty. 15 U.S.C. Section 1640(a)(2). The Court of Appeals' approval of the District Court's limiting attorney's fees to the amount of recovery defeats this Congressional purpose since it would not be feasible for any attorney in private practice to handle a Truth in Lending case if he cannot be paid more than $100.00 in attorney's fees.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 261, note 34, the Supreme Court noted that the award of fees under the Truth in Lending Act is mandatory, stating:

> "It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees *so as to encourage private litigation.*" (Emphasis added.)

Many courts have emphasized the "private attorney general" aspect of the civil liability provisions of the Truth in Lending Act. See, for example, *Thomas* v. *Myers-Dickson Furniture Co.,* 479 F.2d 740 (5th Cir. 1973); *Ratner* v. *Chemical Bank New York Trust Co.,* 329 F.Supp. 270 (S.D.N.Y. 1971); and *McGowan* v. *King, Inc.,* 569 F.2d 845 (5th Cir. 1978). A single violation of

the Truth in Lending disclosure requirements is sufficient to trigger the civil liability provisions. See, *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973); *Walker* v. *College Toyota, Inc.,* 519 F.2d 447 (4th Cir. 1975); and *McGowan* v. *King, Inc.,* 569 F.2d 845 (5th Cir. 1978). Such suits are recognized as aiding general compliance with the statutory scheme. *Sosa* v. *Fite,* 498 F.2d 114 (5th Cir. 1974).

Congress has expressed a strong policy of encouraging compliance with many federal statutes through private litigation by enacting provisions for the award of attorney's fees. In enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, the House Committee on the Judiciary stated:

> "The effective enforcement [of such statutes] depends largely on the efforts of private citizens. . . . In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. . . . In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." H. R. Rep. 1558, 94th Cong., 2nd Sess., at 1 (1976). (Bracketed material supplied.)

Unless the courts award fees adequate to compensate attorneys representing consumers in Truth in Lending actions, this Congressional policy of providing "effective access to the judicial process" will be frustrated. By severely and unwarrantably limiting attorney's fees to the amount of recovery, the District Court and the Court of Appeals have frustrated the intent of Congress, of encouraging private litigation.

There is no statutory authority for linking the amount of attorney's fees to the amount of damages recovered. Although Congress placed maximum and minimum limits on the civil penalty provided for in the Act, it did not place any maximum or minimum limits on attorney's fees. If Congress had intended that attorney's fees in Truth in Lending cases should be in "proportion with the amount in controversy", it could have so provided. Congress, therefore, has necessarily determined that public policy requires adequate compensation to attorneys to encourage private litigation.

By arbitrarily limiting consumers' attorney's fees to the amount of the total recovery and by ignoring relevant factors to be considered in awarding attorney's fees, the majority decision has effectively discouraged private litigation. As pointed out by the dissenting opinion, "A provision for attorney's fees helps assure that enforcement will take place. But such a provision is rendered meaningless unless attorneys for successful parties are given reasonably adequate compensation for their services." *Mirabal* v. *General Motors Acceptance Corp.*, 576 F.2d 729 (7th Cir. 1978), at page 734.

The reasoning of the majority in placing an upper limit on attorney's fees leads to a *reductio ad absurdum*. If the maximum recovery in the instant case had been $200.00 instead of $2,000.00, according to the majority's reasoning, the fee could not exceed $200.00 for 350 hours or 57 cents an hour.

As a basis for its decision, the majority apparently relied on *Sprogis* v. *United Airlines, Inc.*, 517 F.2d 387, 391 (7th Cir. 1975) brought under Title VII of the Civil

Rights Act of 1964. The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, P. L. 94-559, 90 Stat. 2641, Oct. 19, 1976, 42 U.S.C. §1988, indicates that Congress rejected that part of the reasoning of *Sprogis, supra,* relied on by the majority. S. Rep. No. 94-1011, 94th Cong. 2d Sess. (1976) at 6 U.S. Code Cong. & Admin. News 1976, pages 5908, 5913.

Contrary to the majority's decision and as pointed out by the dissent, the circumstances of the instant case furnished extremely strong support for granting an award of attorney's fees greatly in excess of the clients' recovery. The majority felt compelled to ignore the admitted fact that the attorneys for General Motors Acceptance Corporation were paid over $30,000.00 for essentially similar legal services. But the dissent points out: "One of the factors which District Courts are to consider in setting a reasonable fee is '[t]he fee customarily charged in the locality for similar legal services.' *Waters, supra,* 502 F.2d at 1322. What better evidence is there of this information than the fee which defendants paid their attorneys?" *Mirabal* v. *General Motors Acceptance Corp.*, 576 F.2d 729 (7th Cir. 1978), at page 733, footnote 11. See, *Taylor* v. *Scarborough,* 66 F.2d 589, 591 (2d Cir. 1933).

Finally, the majority has ignored all but one of the twelve factors established as guidelines for the award of attorney's fees in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

The need for adequate compensation under the Truth in Lending Act is particularly important since the minimum statutory penalty is $100.00 per transaction. If the majority decision is permitted to stand, then the Truth

in Lending Act has become a mere hollow pronouncement which the average citizen will not be able to enforce.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-1651

JOHN MIRABAL and SHARON MIRABAL,
Plaintiffs-Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION, a corporation, and ED MURPHY BUICK-OPEL, INC., a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 3134

JOSEPH SAM PERRY, *Judge.*

ARGUED FEBRUARY 27, 1978 - DECIDED MAY 12, 1978

Before SWYGERT, SPRECHER, and WOOD, *Circuit Judges.*

PER CURIAM. The issue presented in this appeal is whether the district court abused its discretion in determining that petitioner, attorney for plaintiffs, was entitled to $2,000 in attorney's fees and $690.10 in costs.

I

Plaintiffs purchased a new car in 1971 from Ed Murphy Buick-Opel for which the cash price was $4,497.65. This

purchase was financed in the amount of $2,460 through General Motors Acceptance Corporation (GMAC) on a 36-month installment contract. Defendants understated the annual percentage rate applicable to the transaction in the installment contract and GMAC sent a letter to plaintiffs informing them of this error, which letter plaintiffs denied receiving.

Plaintiffs filed an action charging violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and two Illinois statutes. The district court found seven violations of the Truth in Lending Act and awarded $1,000 to plaintiffs for each violation. The district court also found violations of both Illinois statutes and awarded damages in excess of $1,000, bringing the total to over $8,000. On appeal, this court held that multiple recovery for multiple errors in a single disclosure statement was impermissible and that defendants had not violated the two Illinois statutes. *Mirabal* v. *General Motors Corp.*, 537 F.2d 871 (7th Cir. 1976). The judgment was reduced to a total of $2,000 "plus costs and attorney's fees . . ." 537 F.2d at 885.

On remand petitioner alleged that he had expended 350 hours on the case, 120 at the trial level and 230 on the appeal. He also alleged that GMAC's attorneys were paid over $30,000 for handling the case. The district court awarded petitioner the total costs requested and attorney's fees in the amount of $2,000. Petitioner appeals from the attorney's fee award.

II

The district court has broad discretion in making an award of attorney's fees because of the advantage of close observation of the work product of an attorney and an understanding of the skill and time required in the suit. *Lea* v. *Cone Mills Corporation*, 467 F.2d 277, 279 (4th Cir. 1972). Our review is limited to the determination of whether the district court abused this discretion. *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974).

The instant case involves a car costing less than $5,000 and a loan of less than $2,500. Plaintiffs ultimately prevailed to the extent of $2,000 after getting somewhat over $8,000 at the original trial. Petitioner has thus received in attorney's fees an amount equal to that which his clients recovered in total.

Although the determination of hours necessary to effectively handle a case is not subject to exact determination, the amount which petitioner claims to have spent on the present case seems clearly out of proportion with the amount in controversy. Moreover, Congress has limited the liability of Truth in Lending Act violators to $1,000 per violation. 15 U.S.C. § 1640(a). To grant attorney's fees greatly in excess of a client's recovery requires strong support from the circumstances of the particular case. The instant case involved a one-time individual claim based mainly on a bona fide arithmetical error. As this court declared in *Sprogis* v. *United Air Lines, Inc.*, 517 F.2d 387, 391 (7th Cir. 1975), when it balked at the fee request presented there:

> First, this case does not represent the typical . . . claim envisioned by Congress and in the past sponsored by various public interest organizations. Second, the claim for attorney's fees is not proportionate to the recovery of damages by plaintiff. Third, the precedential value of this decision is not controlling in light of [its reliance on an admitted arithmetical error].

Additionally, to grant large attorney's fee awards on the basis of relatively small injury would encourage suits which do not further the client's interest or the public's interest. The costs of these suits already forces many claims to settlement. *See* Landers, *Some Reflections on Truth in Lending*, 1977 Ill. L.F. 660, 680-81. Indeed, petitioner himself has inadvertently provided this court with an example of the questionable results in such suits. *See* Plaintiffs' Reply Memorandum (Document 16), page 4, and the letter attached to it. There petitioner made a set-

tlement in a Truth in Lending case in which his client received $400 while petitioner was paid $12,000 as attorney's fees for the settlement. While such disproportionate sums may be exacted in settlement agreements, we should be loathe to automatically provide judicial approval for such results when these cases reach the court.

Petitioner also claims that the attorneys for GMAC were paid over $30,000 and that this amount is indicative of what he should be paid (Petitioner's Brief, page 20). This contention was repeated at oral argument. This circuit has held that it is an abuse of discretion to determine attorney's fees solely on the basis of hours spent times billing rate. *Waters, supra,* at 1322. Petitioner wants us to go a step further and award him a fee based on what the *opposing side* spent in time and money. This ignores the fact that a given case may have greater precedential value for one side than the other. Also, a plaintiff's attorney, by pressing questionable claims and refusing to settle except on outrageous terms, could force a defendant to incur substantial fees which he later uses as a basis for his own fee claim. Moreover, the amount of fees which one side is paid by its client is a matter involving various motivations in an on-going attorney-client relationship and may, therefore, have little relevance to the value which petitioner has provided to his clients in a given case.

Therefore, for the reasons discussed above, we conclude that the district court properly acted within its discretion in setting the award of attorney's fees at $2,000.

AFFIRMED.

SWYGERT, *Circuit Judge,* dissenting. Despite the thoughtful analysis of the majority's opinion, I am unable to agree with the conclusion it reaches. The enormous disparity between the amount of money received by defendants' attorneys and plaintiffs' attorney disturbs my sense of fairness. Plaintiffs won their lawsuit (though losing part of it on appeal), and yet their counsel received only one-

fifteenth of what defendants' counsel was paid for defending the suit. This, together with the summary manner in which the fee proceeding was handled, compels me to dissent.

I

In 1971 plaintiffs purchased a new automobile from defendant Ed Murphy Buick-Opel, Inc. They financed part of this purchase through a retail installment contract with defendant General Motors Acceptance Corporation.[1] Later that year plaintiffs filed this action charging that defendants had committed numerous violations of the Truth in Lending Act, 15 U.S.C. §§ 160 *et seq.*, and two Illinois statutes regulating consumer automobile financing.[2] Included in the allegations was a charge that defendants had understated the annual percentage rate by almost two percent. Defendants, while conceding that they had erroneously stated the annual percentage rate, asserted that the error resulted from a bona fide mistake and therefore they were statutorily exempt from liability.[3] The district court disagreed and entered judgment for plaintiffs, finding seven different Truth in Lending violations as well as vio-

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[1] The cash price for the car including service, accessories, and taxes totaled $4,497.65. The total deferred payment price which plaintiffs financed through GMAC was $2,971.00. This sum included $2,201.00 for the principal, $257.00 for mandatory physical damage insurance, and $511.80 for the finance charge.

[2] They were the Illinois Motor Vehicle Retail Installment Sales Act, Ill. Rev. Stat. ch. 121½, §§ 561 *et seq.*, and the Illinois Sales Finance Agency Act, Ill. Rev. Stat. ch. 121½, §§ 401 *et seq.*

[3] 15 U.S.C. § 1640(c) provides in part:

> A creditor may not be liable . . . if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

lations of both Illinois acts. Damages were assessed in the sum of $8,126.80, $1,000 for each violation of the Truth in Lending Act and $1,126.80 for the two state law violations. The defendants appealed and the plaintiffs cross-appealed.[4]

After judgment had been entered but before the case was argued on appeal, Congress amended the Truth in Lending Act by barring multiple recovery for multiple errors committed in a single disclosure statement.[5] Under the amendment the most a debtor can recover in civil penalties is $1,000, regardless of the number of disclosure errors committed by a creditor in a single transaction.

On appeal we affirmed in part the judgment of the district court. *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976).[6] This court found that defendants had not met their burden of establishing that they were exempt from liability for misstating the annual percentage rate. Because the recently enacted amendment limiting recovery to $1,000 per transaction was held applicable to this pending cause, we did not consider the other six disclosure errors found by the trial court. Moreover, that part of the judgment finding liability under the two Illinois acts was reversed.

Plaintiffs also met with mixed success on their cross-appeal. While this court rejected the argument that defendants were severally liable under the Truth in Lending Act, it did agree with plaintiffs that each debtor was entitled to a separate recovery of $1,000. Because of the

[4] Plaintiffs cross-appealed on two issues: (1) whether the defendant-creditors were separately rather than jointly liable, and (2) whether separate recoveries were available for each plaintiff. Although plaintiffs lost the first issue on appeal, they did win the second. 537 F.2d at 880-83.

[5] 15 U.S.C. § 1640(g), *as amended,* Pub. L. No. 93-495, § 408(e), 88 Stat. 1519. This amendment became effective October 28, 1974.

[6] This case is discussed in Recent Developments, *Truth in Lending,* 11 Ind. L. Rev. 119 (1977).

statutory change in the Truth in Lending Act, this court reduced the amount of judgment to $2,000 and remanded the cause for a determination of costs and attorney's fees.

On remand plaintiff's attorney filed a verified petition for award of attorney's fees and costs. In it he stated that he spent 350 hours on this case, 120 hours for trial and 230 hours on the appeal. Defendants did not answer the petition;[7] they disputed neither the number of hours which counsel had expended nor that these hours were necessary to perform the legal services properly. It did become evident that defendants had paid their attorneys more than $30,000 in defending this suit.

A hearing was never held on the fee issue even though one had been requested by petitioner, plaintiffs' attorney. Instead the district court entered a minute order awarding $2,000 in attorney's fees and $690.10 in costs. Petitioner appeals the fee award.

II

In awarding plaintiffs' attorney $2,000 for 350 hours of work,[8] the district court said that the expenditure of this many hours on this case was "utterly unnecessary." In the judge's view, most of these hours were spent in advancing "excessive legal theories." Which theories were excessive and what hours were unnecessary were not specified in the order.

I find it anomalous that the district court, after finding seven different Truth in Lending violations and two state disclosure violations and awarding plaintiffs over $8,000, is now able to say that plaintiffs' counsel advanced exces-

[7] Defendants did file a petition for offsetting attorney's fees, wherein they claimed they were entitled to $7,500 in fees for ultimately winning on the counts under the Illinois statutes.

[8] Neither the defendants nor the district court ever claimed that plaintiffs' counsel did not expend 350 hours on this case.

sive legal theories. Moreover, was it "utterly unnecessary" for plaintiffs' counsel to defend the judgment once defendants chose to appeal? And, was it "utterly unnecessary" for plaintiffs to cross-appeal? I believe that plaintiffs not only had the right, but under Canon Seven of the Code of Professional Responsibility,[9] plaintiffs' attorney had the duty to protect the judgment he obtained for his clients.[10] Furthermore, had plaintiffs not cross-appealed, they would have recovered only $1,000 instead of the $2,000 ultimately awarded by this court.

If the district court had held a hearing as plaintiffs requested, we might now know what theories it believed were excessive and what hours were therefore unnecessary. In short, we would be informed how the court arrived at the $2,000 figure. But in the absence of such reasons, the only reasonable inference is that the fee award was matched to the judgment which plaintiffs ultimately obtained. But if it is an abuse of discretion to set fees solely on the basis of a formula applying hours spent times billing rate, *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309, 1322 (7th Cir. 1976), I believe it is equally abusive to award fees solely by the amount of recovery obtained.[11]

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[9] Canon Seven provides: "A lawyer should represent a client zealously within the bounds of the law."

[10] Nor should counsel be penalized because Congress amended the Truth in Lending Act between entry of the judgment and the appeal. As this court noted in the earlier opinion, whether such a statutory change could apply to a case wherein a judgment had been entered was a question whose answer was "not particularly clear." 537 F.2d at 875. Counsel was therefore fully justified in briefing and arguing that the amendment could not be applied to this case.

[11] I too agree that petitioner is not entitled to an award of $30,000 just because defense counsel received such a sum. But I do not agree that such evidence is irrelevant. One of the factors which district courts are to consider in setting a reasonable fee is "[t]he fee customarily charged

III

The conclusion reached by the majority seems to be based primarily on the belief that the granting of large attorney fee awards (regardless of the validity of such an award in a particular case) will encourage the filing of questionable claims which defendant-creditors will be forced to settle because the costs of litigation will become too prohibitive. I share this concern and believe it is an important consideration in making a fee award. My difficulty, however, is that it does not fit the facts of this case.

The record here is barren of any evidence that plaintiffs pressed questionable claims or refused to settle except on outrageous terms. If anything, the record proves the contrary. The district court found that defendants had violated two state laws and had violated the Truth in Lending Act in seven different ways. This court affirmed the violation concerning understating the annual percentage rate; it did not have to consider the merits of the other Truth in Lending violations because of the interpretation given the 1974 amendment.

Nor is this a case where the defendants were at the mercy of the plaintiffs, who typically set the perimeters of a lawsuit. At trial it was the defendants who had the burden of establishing their affirmative defense of a bona fide mistake. Furthermore, after losing on all issues, it was defendants who chose to appeal and challenge the find-

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[11] (Continued)

in the locality for similar legal services." *Waters, supra,* 502 F.2d at 1322. What better evidence is there of this information than the fee which defendants paid their attorneys? I fully concur with the Second Circuit when it said in *Taylor* v. *Scarborough,* 66 F.2d 589, 591 (2d Cir. 1933):

> While the fee paid counsel by the other side is by no means conclusive of what is a reasonable fee for the plaintiffs' services, we do think that it is quite persuasive in the circumstances here disclosed.

ings of the trial court. The point is this: All the aces were not in plaintiffs' hands as the defendants would suggest. Unlike the typical case, the defendants here held some of the aces. The defendants were legally justified in electing to make a militant defense; they also had the right to appeal an adverse judgment. But in deliberately choosing such a course of action, they cannot now be heard to complain that it would be unfair to require them to pay a reasonable fee to plaintiffs' attorney.

Defendants are not without weapons to curtail, if not stop entirely, the possibility of "forced settlements." If a plaintiff's settlement demands are unreasonable, a defendant may make an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Once a defendant makes such an offer, he is not liable for plaintiff's costs and attorney's fees if plaintiff does not ultimately recover the amount of the offer. Through such a device a defendant can place on the plaintiff much of the financial risk involved in litigation.

Finally, the policy of discouraging the filing of questionable claims must be balanced against the policy underlying the Truth in Lending Act itself. That Act embodies the national policy that economic stabilization and competition will be enhanced if consumers are given accurate and meaningful disclosure of credit. *See* 15 U.S.C. § 1601. Enforcement of this policy was placed primarily on the private sector through suits for civil penalties. A provision for attorney's fees helps assure that enforcement will take place. But such a provision is rendered meaningless unless attorneys for successful parties are given reasonably adequate compensation for their services.

The need for adequate compensation is particularly important since the statutory penalty is now limited to $1,000 per transaction. If a presumption is imposed that a successful attorney is allowed only that amount recovered by his client—as apparently was done here—creditors can effectively stop the filing of all Truth in Lending actions. By refusing to negotiate even reasonable claims and by

litigating every case, creditors can soon force a plaintiff to terminate the litigation, not because his claim is invalid, but because it is no longer economically feasible for his attorney to continue the case. This case is a prime example. I dare say few attorneys will handle a Truth in Lending case when they learn that they may earn only $5.71 an hour.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 14, 1978

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge**

Hon. ROBERT A. SPRECHER, *Circuit Judge*

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 77-1651

JOHN MIRABAL and SHARON MIRABAL,
Plaintiffs-Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION, a corporation, and ED MURPHY BUICK-OPEL, INC., a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 3134

JOSEPH SAM PERRY, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed by counsel for plaintiffs-appellants, the brief of Amicus Curiae in support of plaintiffs-appellants' petition for rehearing *in banc*, and

---

Judges Cummings, Pell and Tone did not participate in rehearing.

* Judge Luther M. Swygert voted to grant petition for the consideration of this matter.

response to petition for rehearing *in banc* filed by counsel for defendants-appellees in the above-entitled cause, no judge in active service has requested a vote thereon and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and the suggestion that it be reheard *in banc* be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 71 C 3134 Date April 21, 1977

Title of Cause — Mirabal, et al. vs. General Motors Acceptance Corporation, et al.

—This cause comes on upon the petition of plaintiffs' counsel, Albert Koretzky, for award of attorney's fees and costs, and upon defendants' cross-petition for an equal offsetting fee and for costs.

The court has read and considered said petition and cross-petition and the memoranda of the petitioner and the cross-petitioners and finds that Attorney Koretzky should be awarded a fee of $2,000.00 and costs of $690.10, and that the cross-petitioners are entitled neither to any fee nor to any costs.

Petitioner Koretzky has requested the award of a fee which in effect would exceed $30,000. To award a fee of such magnitude would be against public policy. It is obvious to this court that the expenditure of 350 hours on this case was utterly un-necessary, that most of that

time was spent in advancing excessive legal theories which were not sustained by the Court of Appeals, and that plaintiffs' counsel needed only a comparatively few hours to develop the only issues on which the plaintiffs prevailed. In view of the foregoing, for this court to award more than $30,000 in attorney's fees to an attorney whose clients recovered only $2000 would nuture "windfall litigation".

Accordingly, it is ORDERED that the sum of $2000.00 in attorney's fees be and it hereby is awarded to the aforesaid Albert Koretzky; that the sum of $690.10 in costs be and it hereby is awarded to said Albert Koretzky; and that defendants' aforesaid cross-petition be and it hereby is DENIED.

/s/ J. S. Perry

No. 78-611

Supreme Court, U. S.
FILED
NOV 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOHN MIRABAL, SHARON MIRABAL, and ALBERT KORETZKY,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION and ED MURPHY BUICK-OPEL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION IN OPPOSITION

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La Salle Street Press — Chicago Printed in U.S.A.

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No. 78-611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOHN MIRABAL, SHARON MIRABAL, and ALBERT KORETZKY,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION and ED MURPHY BUICK-OPEL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION IN OPPOSITION

QUESTION PRESENTED

Did the court of appeals err in finding that the district court did not abuse its discretion in ruling, on the particular facts before it, that plaintiffs were entitled to $2,000.00 as a reasonable attorney's fee following their recovery of a statutory penalty of $2,000.00 under the Truth in Lending Act?

STATEMENT OF THE CASE

This Truth in Lending action arose out of the sale to petitioners John and Sharon Mirabal of an automobile

financed through a retail installment sales contract in the amount of $2,460.00 which was purchased by GMAC. *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 874 (7th Cir. 1976). Approximately one week after the sale took place, GMAC discovered that the annual percentage rate had been misstated and so notified petitioners. *Ibid.* Petitioners later filed suit, alleging numerous violations of the Truth in Lending Act (but failing to make any claim for the admitted arithmetical error), and added state law claims under the Illinois Motor Vehicle Retail Installment Act, ILL.REV.STAT., ch. 121½, § 561 *et seq.* (1967) and the Illinois Sales Finance Agency Act, ILL.REV.STAT., ch. 121½, § 401 *et seq.* (1967). *Ibid.* The present petition raises no substantive issue under any of these statutes, but seeks only review of the amount of the attorney's fee awarded petitioners pursuant to 15 U.S.C. § 1640(a)(3), which authorizes the district court to award "a reasonable attorney's fee" in "any successful action" to enforce the provisions of the Truth in Lending Act.

After a bench trial, petitioners amended their complaint to add a claim related to the misstated annual percentage rate. The district court ruled that seven violations of the Truth in Lending Act had occurred and awarded petitioners $1,000.00 for each of them. Respondents were also found liable under both state acts, bringing the total penalty assessed to more than $8,000.00. *Ibid.*

The court of appeals reversed the district court in major part. *Ibid.* The court considered only a single substantive issue under the Truth in Lending Act: whether the conceded arithmetical mistake was "not intentional and resulted from a bona fide error" within the meaning of § 130(c) of the Act, 15 U.S.C. § 1640(c), proof of which is a complete defense. It held, one judge dissenting, that respondents had not met the test of that section. *Id.* at 876-79. The

court also ruled that a recent amendment to the Act permitting recovery of a single statutory penalty in an action based on a single transaction, 15 U.S.C. § 1640(g), stated the applicable law on appeal (*id.* at 875-76); that each petitioner was entitled to a separate recovery (*id.* at 881-83); and that respondents' good faith precluded liability under either of the Illinois statutes (*id.* at 883-85). The court did not consider any of the other claims of Truth in Lending violation alleged. The court reduced the $8,126.80 judgment to $2,000.00 and remanded the case to the district court for a determination of costs and attorney's fees. *Id.* at 885.

Petitioners filed their petition for attorney's fees and costs in the form of an affidavit from their attorney, Albert Koretzky. Mr. Koretzky also purports to be a petitioner here. The affidavit averred, without supporting documents or explanation, that he had spent 350 hours on the case, but did not suggest any figure as an appropriate fee. The district court awarded petitioners $2,000.00 as a reasonable attorney's fee. *Mirabal* v. *General Motors Acceptance Corp.*, 576 F.2d 729, 730 (7th Cir. 1978).

Petitioners appealed this award and the Seventh Circuit affirmed, ruling that the district court acted "properly within its discretion." *Ibid.* Their petition for a rehearing and suggestions for a rehearing *en banc* were denied. From that ruling, petitioners seek certiorari.*

---

* John and Sharon Mirabal were the plaintiffs below. Albert Koretzky, their attorney, has added his name to the caption in this Court as a "petitioner." Since he suffered no adverse personal judgment below, he has no standing to seek certiorari. It is clear that the right to attorney's fees under the Truth in Lending Act is personal to the plaintiff, not his attorney. *See, e.g.*, *Sellers* v. *Wollman*, 510 F.2d 119, 123 (5th Cir. 1975); *Ecenrode* v. *Household Finance Corp.*, 422 F.Supp. 1327, 1330 (D.Del. 1976); and *Buford* v. *American Finance Co.*, 333 F.Supp. 1243, 1252-53 (N.D Ga. 1971).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT SATISFY SUPREME COURT RULE 19.

In considering a petition for a writ of certiorari to a court of appeals, this Court's decision is guided by the considerations set forth in Rule 19(1)(b):

> "Where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; * * * or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with the applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners cannot meet any of Rule 19's applicable criteria.

A. The Courts of Appeals Are Not in Conflict.

Petitioners are asking this Court to review the affirmance of a discretionary award of attorney's fees. In short, they are seeking one more review of a specific factual determination.* Since these factual issues are limited to this case, there is no occasion for conflict between the circuits.

---

* There is no question that petitioners are seeking a third factual review. Mr. Koretzky's *sua sponte* addition of himself as a "petitioner" to this Court evidences his intention to argue positions benefiting only himself, not his clients or the public in general. "[The Court does not] sit for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Nor does it sit for the benefit of their lawyers.

Even the dissent below, relied upon so heavily by petitioners, recognized that its difference with the majority arose out of a purely factual determination. After noting that the majority had concluded that granting disproportionately large fee awards would "encourage the filing of questionable claims which defendant-creditors will be forced to settle because the costs of litigation will become too prohibitive," the dissent stated: "I share this concern and believe it is an important consideration in making a fee award. My difficulty, however, is that it does not fit *the facts of this case.*" 576 F.2d at 733 (emphasis supplied).

Nor is it possible to discern from the petition any legal issue upon which courts of appeals might be in conflict. There is no question that the amount of attorney's fees awarded in cases under the Truth in Lending Act, as in other cases where a fee award is appropriate, is a matter within the sound discretion of the district court. The statute itself provides that the attorney's fee is to be "determined by the Court." 15 U.S.C. § 1640(a)(3). *See also Hammond* v. *Public Finance Corp.*, 568 F.2d 1362, 1364 (5th Cir. 1978); *Barber* v. *Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978); and *Brito* v. *Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973).

Neither is there conflict over the factors to be considered in setting the amount of an award. The Seventh Circuit in this case followed *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), which adopts the criteria of Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association. Other circuits have promulgated virtually identical tests based on this Disciplinary Rule. *See, e.g., Barber* v. *Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978); *King* v. *Greenblatt*, 560 F.2d 1024, 1026-28 (1st Cir. 1977), *cert. denied*, 438 U.S. ___, 46 U.S.L.W. 3803 (June 27, 1978); *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. ___, 98 S. Ct. 2565 (1978); *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177, 187-88 (D.C. Cir. 1974); and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In short, the courts of appeals are not in conflict on any legal issue considered by the two courts below.

B. The Court of Appeals Did Not Decide Any Issue of Federal Law Requiring Resolution by This Court.

As noted above, the Seventh Circuit's review of the district court's discretionary fee award did not involve any legal issue at all, much less "an important question of federal law" as required by Rule 19. The case presented no issue of constitutional law, nor was the validity or interpretation of any federal statute at issue. Finally, the petition does not seek vindication of any individual civil right. Solely and simply, it seeks this Court's aid in garnering an increased fee award for an attorney.

Petitioners' only argument is that "limiting awards of attorney's fees to the amount of recovery obtained is contrary to the policy of the Truth in Lending Act." (Pet. at 6.) However, there is no basis in the record for any conclusion that the fee award in this case was "limited to the amount of recovery." Certainly no inference may be drawn from the fact that the fee award was an even $2,000.00. District courts frequently award fees in Truth in Lending cases in round thousands of dollars. *See, e.g., Starks* v. *Orleans Motors, Inc.*, 372 F.Supp. 928, 933 (E.D.La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974) ($2,000.00); *Doggett* v. *County Savings & Loan Co.*, 373 F.Supp. 774, 778 (E.D. Tenn. 1973) ($1,000.00); *Pedro* v. *Pacific Plan of California*, 393 F.Supp. 315, 324 (N.D. Cal. 1975) ($3,000.00); and *Meyers* v. *Clearview Dodge Sales, Inc.*, 384 F.Supp. 722, 729 (E.D.La. 1974), *rev'd in part on other grounds*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) ($3,000.00). Since petitioners' argument for granting the writ is based on their assumption that the district court limited the fee award to the amount of judgment, and since that assumption is open to serious doubt, this case lacks the concreteness necessary for adjudication before this Court. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

Even if petitioners could support their speculation that the award was in any way "limited" by the district court, they have not adduced a single reason for finding it to be "contrary to the policy" of the Truth in Lending Act. The cases cited by petitioners establish only that some federal statutes provide for the award of a reasonable attorney's fee to successful plaintiffs in order to make enforcement of the underlying substantive law a private, as well as a public matter. Petitioners do not make the slightest effort to explain how the result below is "contrary" to that "policy". Indeed, since, as they point out, "a single violation of the Truth in Lending disclosure requirement is sufficient to trigger the civil liability provisions" (Pet. at 7), the Seventh Circuit's decision means that, for prosecuting a claim based only on an *admitted arithmetical error*, an attorney may receive a $2,000.00 fee. It is inconceivable that the decision below will frustrate any federal policy of encouraging "private attorneys-general" under the Truth in Lending Act.

C. The Decision Below Does Not Conflict with Any Applicable Decisions of this Court.

Petitioners do not suggest that the ruling of the Seventh Circuit is contrary to any decision of this Court.

D. The Proceedings Below Were Not of Such a Nature as to Require This Court's Supervision.

Petitioners have not complained of any procedural irregularity in either court below.

II. THE DECISION BELOW IS A STRAIGHTFORWARD APPLICATION OF LAW TO THE FACTS OF THIS CASE.

After reviewing the facts, the Seventh Circuit explained that its review "is limited to the determination of whether

the district court abused [its] discretion." 576 F.2d at 730. It found no such abuse. The court based its decision on several considerations:

1. The amount of time petitioners' attorney claimed to have spent on the case was "clearly out of proportion to the amount in controversy." *Id.* at 730.

2. The "strong support from the circumstances of the particular case" necessary to justify the award of fees "greatly in excess of a client's recovery" was not present in this case.* Rather, "[t]he instant case involved a one-time individual claim based mainly on a bona fide arithmetical error." *Ibid.*

3. In addition, to permit such a recovery on the basis of a "relatively small injury" would encourage suits not in the interest of the client, much less the public. Permitting inflated fee awards "forces many claims to settlement." Petitioners' attorney volunteered the fact that in another case he had received $12,000.00 in connection with a $400.00 settlement for his client. The court of appeals strongly disapproved this "questionable result," stating:

> "While such disproportionate sum may be exacted in settlement agreements, we should be loathe to automatically provide judicial approval for such results when these cases reach the courts." *Id.* at 731.

The courts below decided this simple fee claim by the application of salutary judicial principles to undisputed facts. The decision should not be disturbed.

* On appeal, petitioners' attorney disclosed his belief that he was entitled to $30,000.00 for his efforts in recovering $2,000.00 for his clients. He supported this belief by the fact that respondent GMAC paid its attorneys a similar amount for a variety of services in connection with the litigation. The court of appeals recognized this to be a thoroughgoing *non sequitur*. 576 F.2d at 731.

III. THE LOWER FEDERAL COURTS ARE PECULIARLY WELL-SITUATED TO MAKE FINAL RULINGS ON FEE AWARDS.

The amount of the fee award rests within the sound discretion of the district court. *Barber* v. *Kimbrells, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). This is because the trial judge is familiar with the efforts and skill of the attorneys and is in the best position to determine their value to the plaintiff, the court, and the public. *Lea* v. *Cone Mills Corp.*, 467 F.2d 277, 279 (4th Cir. 1972). Hence, the appellate function is only to review the trial judge's exercise of discretion. *Thomas* v. *Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973). This Court is even further removed from that process and should decline to review the facts already ruled on twice below.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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November 8, 1978